

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES T. NORVELL, an individual,

Plaintiff,

vs.

BNSF RAILWAY COMPANY,

Defendant.

Case No.: 3:17-CV-05683-BHS

**DEFENDANT BNSF RAILWAY
COMPANY'S OBJECTION TO
VIDEO ZOOM JURY TRIAL**

**NOTED FOR HEARING:
Friday, November 5, 2021**

Defendant BNSF Railway Company ("BNSF") respectfully objects to holding the jury trial in this matter by zoom video and requests an in-person jury trial.

I. Introduction.

As the COVID-19 pandemic continues to wind down, both local governments and the courts have reopened to the public. Courts in the Western District of Washington have conducted in person jury trials safely under the protocols of the District under its General Orders. COVID-19 positive tests, hospitalizations and deaths are down significantly in Washington. Gen Order 10-21 (W.D. Wash. June 30, 2021). In Washington State, 78% of the population age twelve and up have received at least one dose of the vaccine, and 72.5% of the same population are fully vaccinated. <https://www.doh.wa.gov/emergencies/covid19/datadashboard>. In the venire population for this Court, the following percentage of the population has been vaccinated:

County	Fully Vaccinated (all residents)	Fully Vaccinated (18+ years of age)	Fully Vaccinated (65+ years of age)
Pierce	56%	68%	85%
King	71%	83%	90%
Thurston	59%	69%	86%
Mason	54%	64%	81%
Lewis	46%	55%	72%
Yakima	54%	70%	83%
Kitsap	58%	68%	88%

<https://www.nytimes.com/interactive/2021/us/washington-covid-cases.html>

Where reasonable control of COVID-19 is at hand, it would be more appropriate to conduct this trial in-person with the measures outlined in Gen. Orders 10-21 and 11-21 in place. BNSF believes an in-person jury trial is the best way to ensure fairness and to avoid many of the inherent problems with Zoom hearings.

II. Current Status of In-Person Trials in the Western District of Washington – General Orders 10-21 and 11-21.

On June 30, 2021, Chief United States District Judge Ricardo Martinez for the Western District of Washington issued General Order 10-21, which was intended to “address a change in Court policies given the significant reduction in the number of Coronavirus Disease 2019 (COVID-19) cases in this District” and reopen the courthouses for in-person hearings. Gen Order 10-21 (W.D. Wash. June 30, 2021) The Order found:

In the last three months, the daily number of COVID-19 positive cases, hospitalizations, and deaths have significantly decreased in the Western District of Washington. State records show that a significant majority of adults in this district have now been fully vaccinated against the novel Coronavirus. All available research indicates that widely available vaccines provide significant protection against this disease. The Governor of the State of Washington has stated that the State will “reopen” after June 30, 2021.

Gen. Order 10-21, p. 1. The Order further held “the procedures of General Order 18-20 will no longer be continued. All civil, criminal, and bankruptcy in-person hearings and trials may proceed as scheduled. The courthouses are open to the public.” Id. at p. 2. The Order outlined certain

1 protective measures for the participants, including mask wearing.¹

2 Order 10-21 did find that “civil bench and jury trials may be conducted remotely over
3 Zoom.gov if good cause is established for such a procedure on a case-by-case basis, at the
4 discretion of individual judges.” Id. at p. 3. This procedure is at the discretion of the Court;
5 however, the order indicates that an in-person trial should be held unless good cause is shown
6 otherwise. In the case of *Bao Xuyen Le v. Reverend Dr. Martin Luther King, Jr. County*, 524
7 F.Supp.3d 1113 (W.D. Wash. 2021), the District Court ruled that a civil case should proceed with
8 a Zoom jury trial over defendant’s objections. However, since the decision in *Bao Xuyen Le* was
9 issued in March 2021, the circumstances we find ourselves in are dramatically different, as the
10 infection rates, hospitalizations and deaths have dropped dramatically, the Courts have re-opened
11 to the public, Washington State has generally reopened, vaccinations became widely available,
12 and the vaccination rate is very high. *See* Gen. Order 10-11 p. 1. Further, counsel for BNSF
13 understands that this Court has conducted in person jury trials in criminal cases since the pandemic
14 began without incident.

15 **III. An In-Person Hearing for this Trial is Appropriate and Will Insure a Fair Trial.**

16 The use of Zoom trials may have been necessary at the beginning of the pandemic and
17 through early 2021 when there was so much uncertainty and fear, and the nation’s court system
18 risked coming to a complete halt. However, currently the infection, hospitalization and death rates
19 are down significantly, and a very large portion of the population both nationally and in this district
20 have been vaccinated. The FDA further fully approved the Pfizer vaccine on August 23, 2021.

21 <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19->

22 [vaccine?s_cid=11700:covid%20vaccine%20fda%20approval:sem.ga:p:RG:GM:gen:PTN:FY22](https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine?s_cid=11700:covid%20vaccine%20fda%20approval:sem.ga:p:RG:GM:gen:PTN:FY22)

23 The state of Washington is open to the public, as are the courts. As control of COVID-19
24 is at hand, it would be appropriate to conduct this trial in-person with the measures outlined in

25
26 ¹ General Order 11-21 issued August 13, 2021 by Chief Judge Martinez of the Western District of Washington slightly modified certain protective measures for in-person trials including mask wearing, but otherwise did not change Gen. Order 10-21.

1 Gen. Orders 10-21 and 11-21 in place. BNSF believes an in-person jury trial is the best way to
 2 ensure fairness and to avoid many of the inherent problems with Zoom hearings, including:

3 **1. The likelihood of inattention and lack of engagement from the jurors.**

4 There have been multiple examples of juror inattentiveness from the experience of other
 5 Zoom jury trials throughout the country that have been raised by the parties in trial and voire dire.
 6 *See Honeywell Int'l Inc.'s Notice of Irregularities at Remote Jury Trial from July 27-29, 2020*,
 7 Case No. RG19041182, at p. 2 (Sup. Ct. Cal., July 29, 2020) (jurors laying down, talking to other
 8 people off screen, working, and exercising during the trial);
 9 [https://www.houstonchronicle.com/news/houston-texas/houston/article/Potential-Harris-County-](https://www.houstonchronicle.com/news/houston-texas/houston/article/Potential-Harris-County-jurors-vaping-doing-yoga-16252820.php)
 10 [jurors-vaping-doing-yoga-16252820.php](https://www.houstonchronicle.com/news/houston-texas/houston/article/Potential-Harris-County-jurors-vaping-doing-yoga-16252820.php) (vaping, doing yoga). Although there may be ways to
 11 try to alleviate the risk, it should not be necessary when an in-person trial can be conducted under
 12 the District's guidelines. Plaintiff has demanded a substantial amount of damages (even though
 13 the only issue at trial is garden variety emotional distress), and BNSF believes that a remote jury
 14 if not fully engaged will unfairly prejudice it in this case.

15 **2. The loss of essential elements of in-person trials.**

16 There is a significant value to being in the courtroom to observe witnesses, interact socially
 17 with the other jurors in deciding the case, maintain the formality of the judicial process, and allow
 18 jurors to monitor their collective conduct during trial. That is difficult to replicate and safeguard
 19 in a virtual setting.

20 **IV. Conclusion**

21 No good cause has been presented that a Zoom trial is necessary, or that an in-person trial
 22 cannot be conducted safely at this time in the Western District of Washington. The courtroom is
 23 large, jurors can be spread out over safe distances, jurors can remain masked, and safe courthouse
 24 screening processes are in place. BNSF does not believe a Zoom trial meets the standards for due
 25 process nor does it ensure the Defendant of the full protections afforded by the Seventh
 26

1 Amendment to the United States Constitution. BNSF respectfully requests that the trial of this
2 matter proceed as an in-person hearing.

3
4 Respectfully submitted this 29th day of October, 2021.

5 OGLETREE, DEAKINS, NASH, SMOAK & STEWART,
6 P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused true and correct copies of the foregoing document to be served upon the following, at the addresses stated below, via ECF.

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Dated this 29th day of October, 2021 in Seattle, Washington.

/s/ Janet C. Fischer

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